APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

A. J. SIMLER, *Plaintiff*,

v.

LESLIE L. CONNER, *Defendant*.

Order Sustaining Motion for Summary Judgment and Judgment

Now on this 12th day of January, 1960, plaintiff appearing by his attorney of record, John B. Ogden, and the defendant appearing by his attorney, Robert O. Bailey, and the Court having heard further from counsel on behalf of plaintiff in opposition to defendant's Motion for Summary Judgment, and having further considered said Motion and heretofore carefully reviewed and examined the depositions of plaintiff, defendant and others, the exhibits, transcripts, pre-trial admissions and the entire record in this cause, the Court finds and determines that there is no genuine issue of any material fact in this case and that the Motion of defendant for Summary Judgment should be sustained and judgment entered summarily for the defendant for the reasons:

That there is no issue of fact concerning the circumstances under which the letter of September 25, 1952 came into existence in which the parties themselves fixed the percentage of recovery to be realized by defendant as his contingent attorney fee provided in the letter of July 18, 1952, and there is no evidence of fraud, overreaching or misconduct on the part of the defendant which would

form any basis to set aside or disregard the letter as a part of the contract between the parties.

That under the terms of the letter of July 18, 1952, properly construed and interpreted, even if the parties had not thereafter agreed upon the percentages, the contingent fee was to be set by the Court without a jury and the Court finds from the undisputed facts as to the services rendered that a reasonable contingent fee for the services of the defendant in this cause is 50% of the real and personal property recovered after payment of the expense of the litigation.

That all the money and property which the plaintiff has received from the estate of his deceased sister came to him by reason of the legal services rendered by the defendant for the plaintiff upon the contingent fee contract composed of the aforesaid letters and in the contest of the will and other actions relating thereto, resulting in the Final Decree of the County Court of Oklahoma County in the estate of Birdine Fletcher, deceased, Cause 31726, decreeing plaintiff, A. J. Simler, to be the owner of a complete title to the Northwest Quarter (NW¼) of Section 34, Township 6 North, Range 10 West, Caddo County, Oklahoma with all interest and mineral rights therein and all oil and gas production therefrom; that defendant performed legal services for and was attorney for plaintiff in some 19 separate cases in the State Courts and Supreme Court of Oklahoma, the Federal Courts, the Court of Appeals and the Supreme Court of the United States; that defendant has fully performed his contract and plaintiff has accepted the benefit of defendant's services all with full knowledge that he was proceeding under said contingent fee contract composed of both of the aforesaid letters.

That this Court now has jurisdiction of the parties and subject matter and in construing and applying the contingent attorney fee contract should sustain the defendant's Motion for Summary Judgment for 50% of all money and

property recovered by defendant for plaintiff which includes 50% of all income therefrom less expenses as provided by said contract and that defendant Leslie L. Conner is entitled to summary judgment against plaintiff A. J. Simler as a matter of law.

It Is Therefore Ordered, Adjudged and Decreed by this Court that the Motion for Summary Judgment of defendant Leslie L. Conner against the plaintiff A. J. Simler allowing a contingent attorney's fee to defendant Leslie L. Conner of fifty per cent (50%) of all property, moneys and the income therefrom recovered should be and the same is hereby sustained.

It Is Further Ordered, Adjudged and Decreed that Leslie L. Conner is the owner of an undivided one-half interest in the fee simple title to land, improvements, surface minerals, mineral rights, and oil and gas production of the Northwest Quarter (NW^1_4) of Section 34, Township 6 North, Range 10 West in Caddo County, Oklahoma, and by this Order said undivided one-half interest in same is hereby conveyed to and vested in Leslie L. Conner.

It Is Further Ordered, Adjudged and Decreed by the Court that the contract between plaintiff A. J. Simler and defendant Leslie L. Conner provided that all expenses, taxes, and costs of the litigation should be deducted from the recovery before the division of recovery made between the parties and the Court finds that there is held in the registry of the Clerk of this Court the sum of Ninety Four Thousand Three Hundred Seventy Seven Dollars and One Cent ($94,377.01), which is part of the recovery made by the defendant Leslie L. Conner.

It Is Further Ordered, Adjudged and Decreed that each of the parties render to the other before the 27th day of January, 1960, an equitable accounting of the moneys received and the expenses, taxes and costs which each claim to have disbursed as contemplated by the above contracts, and

IT IS FURTHER ORDERED that each party shall be reimbursed to the extent he is entitled to be reimbursed and thereafter the balance of the funds in the registry of the Clerk and on hand shall be paid fifty per cent (50%) to defendant, Leslie L. Conner, and fifty per cent (50%) to plaintiff, A. J. Simler.

STEPHEN S. CHANDLER,
United States District Court.

FILED Jan. 12, 1960
VERA L. HOWARD,
Clerk, U. S. District Court.
By Giles K. Ratcliffe, Deputy.
ATTEST: A true copy of the original order,
VERA L. HOWARD, Clerk,
By Joseph P. Gore, Deputy.

APPENDIX B

Judgment

Forty-Ninth Day, May Term, Saturday,
September 3rd, 1960.

Before Honorable Sam G. Bratton, Honorable John C. Pickett, and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court with instructions to grant a jury trial in conformity with the views expressed in the opinion of the court, and that A. J. Simler, appellant, have and recover

of and from Leslie L. Conner, appellee, his costs herein and have execution therefor.

A. J. SIMLER, *Appellant*,

v.

LESLIE L. CONNER, *Appellee*.

No. 6339.

United States Court of Appeals

Tenth Circuit

Sept. 3, 1960.

Rehearing Denied Sept. 27, 1960.

Before BRATTON, PICKETT and LEWIS, Circuit Judges.

PICKETT, Circuit Judge.

This is a declaratory judgment action in which the plaintiff Simler seeks a determination of his liability to the defendant Conner for legal services rendered in an Oklahoma Will contest matter. The pleadings raise the question of whether the liability is to be fixed upon the basis of the reasonableness for the services or by employment letters, one of which would entitle Conner to a one-half interest in property recovered by litigation. Simler's demand for a jury trial on the issue of a reasonable fee was denied by the trial judge. Thereupon Simler brought mandamus proceedings in this court in which he sought an order directing the District Court to submit the issue to a jury. On January 7, 1960, an order was entered directing the District Judge to vacate all orders theretofore entered denying the jury trial to the plaintiff and to submit for determination all disputed issues of fact arising in such action. Defendant's motion for summary judgment was pending and the

order provided that it was not to be construed to affect the right of the District Court to dispose of the action summarily. On January 12, 1960 the District Court entered an order sustaining defendant's motion for summary judgment and adjudged Conner to be the owner of a one-half interest in certain oil producing farm lands which had been distributed to Simler as a result of litigation in the federal courts. This appeal is from that judgment.

Simler's sister, Birdine Fletcher, died in July of 1952, leaving a Last Will and Testament in which she devised to Simler, her sole and only heir at law, the sum of "one dollar and no more." The residue of her estate, which included the oil producing farm lands, was bequeathed to a corporate charitable organization. On July 18, 1952, Simler employed Conner to represent him to contest the admission of the will to probate. The employment was confirmed by a letter of that date in which Simler, in addition to expenses, agreed to pay a reasonable attorney fee for the services in case there was a recovery.[1]

On July 30, 1952, Simler approved the proposed objections to the admission of the will to probate prepared by Conner and directed them to be filed as of that date. Following the will contest hearings, Conner employed additional attorneys to assist him.[2] The attorneys concluded that a federal court action should be instituted to determine the rights of the charitable devisee, a Missouri corporation, to inherit the Oklahoma real property. The filing of this action was authorized by Simler.

The record discloses that because of appeals in the unsuccessful will contest matters and the changed circumstances occasioned by the federal court action, Conner and his associates were not satisfied with the fee arrangement

[1] (Letter of July 18, 1952. See p. 4, supra.).

[2] Conner agreed to share his fee with the additional attorneys and that separate charges were not to be made to Simler.

provided for in the July 18th letter. Consequently Simler, who lived in Arkansas, was called to Conner's office in Oklahoma City, and the matter of fees was again discussed. On September 25, 1952 a second letter was executed by Simler fixing the fee on the basis of specific percentages of any recovery.[3] The attack upon the power of the charitable devisee to inherit Oklahoma real property was successful in this Court (Simler v. Wilson, 210 F.2d 99), and the farm lands were thereafter distributed to Simler, together with impounded income therefrom. Conner assigned 28% of his claim for attorney fees to James E. Grigsby for his services; and Simler settled with Grigsby, taking an assignment of his interest in the property.[4]

It is the contention of Simler that the September 25th letter was executed while the relationship of attorney and client existed between himself and Conner and was therefore unenforceable under Oklahoma law, and that Conner was entitled only to a reasonable fee for his services. Conner contends that the September 25th letter is not a new agreement but merely a determination of the parties as to what should be the reasonable fee provided for in the July 18th letter. We held in the mandamus action that Simler was entitled to a jury trial on the question of the reasonableness of a fee. This leaves for determination only the question of whether the September 25th letter is a valid contract for the payment of attorney fees.

The parties agree that ordinarily an attorney may, in good faith, contract for a percentage or portion of the proceeds of the client's cause of action or claim, not to exceed 50% of the net amount recovered. Title 5, § 7, O.S.A.; Williams v. Wright, 208 Okl. 613, 258 P.2d 162; Renegar v. Fleming, 202 Okl. 197, 211 P.2d 272; Emery v. Goff, 198

[3] (Letter of September 25, 1952. See p. 6, supra.)

[4] The ownership of the Grigsby interest was not determined by the District Court and cannot be disposed of here.

Okl. 534, 180 P.2d 175, 171 A.L.R. 457; Correll v. Holt et al., 191 Okl. 622, 132 P.2d 953; Board of Education of Oklahoma City v. Thurman, 121 Okl. 108, 247 P. 996; Lashley v. Moore, 112 Okl. 198, 240 P. 704.

The relationship of attorney and client is one of special trust and confidence. It requires that an attorney act toward his client with utmost good faith and fidelity. All dealings with the client must be fair, without fraud, duress or imposition. Board of Education of Oklahoma City v. Thurman, supra. The general rule is that contracts entered into between attorneys and clients while the relationship exists are not void as a matter of law. 5 Am. Jur., Attorneys at Law, § 160; 7 C.J.S., Attorney and Client, § 127; Spaulding, et al. v. Beidleman et al., 60 Okl. 183, 160 P. 1120; Annotation 19 A.L.R. 848. In Oklahoma such contracts are presumptively fraudulent and will not be upheld at the instance of the attorney unless a searching scrutiny shows them to be fair, just and equitable. Neary v. Markham, et al., 10 Cir., 155 F.2d 485.[5] When such contracts are called into question, the burden is upon the attorney to establish that they are fairly made, without fraud, duress or imposition. Roseboom v. Baughman, 169 Okl. 442, 37 P.2d 616; Haunstein v. McCalister, 172 Okl. 613, 46 P.2d 552. In Thomas v. Wilson, Okl., 185 P.2d 473, 475, in discussing business transactions between attorney and client, it was stated that the burden is upon the attorney to prove that such dealings are "on that ultra high plane of not only being without fraud, but also above

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[5] Relying on Haunstein v. McCalister, 172 Okl. 613, 46 P. 2d 552, this Court, in Neary v. Markham, 155 F. 2d 485, 488, said:

> "Contracts between attorneys and clients, while not absolutely void, are carefully scrutinized. While they are not void as a matter of law, they are presumptively fraudulent, and will not be upheld at the instance of the attorney unless a searching scrutiny shows them to be fair, just and equitable." (Footnote omitted.)

possibility thereof." Clearly the letter of September 25th, providing that the fees should be a fixed percentage of any recovery, was an adjustment of the original agreement providing for a different schedule, to the advantage of Conner, which made the foregoing rules applicable.

In the Haunstein case [172 Okl. 613, 46 P.2d 556], after stating that contracts between attorney and client to the advantage of the attorney, made while the relationship exists are presumptively fraudulent and that the burden of proof is upon the attorney to show that such contracts are fair, just and equitable, the court continued with the statement: "even then he is not entitled to recover more than reasonable compensation for his services, regardless of the contract price." Simler argues that this statement in effect nullifies the contract and limits the recovery in all such cases to a reasonable fee. If the language is to be construed as Simler contends it should, then all contracts between attorneys and clients made during the existence of the relationship would be ineffective regardless of the good faith and fair dealings of the attorney. It would be in conflict with the actual holding in Haunstein and the approved instruction to the jury on the issue of fraud in that case.

A fair analysis of the decisions of the Supreme Court of Oklahoma establishes that court recognizes and follows the general rule that a contract for compensation of an attorney, made during the existence of the relationship of attorney and client, is valid and enforceable if executed freely, voluntarily and with full understanding of the client. The volumnious record in this case indicates the vast amount of labor, skill and time spent by the attorneys in connection with different cases which reached the appellate courts of the State of Oklahoma and the federal judicial system. We do not intend to minimize the value of these services or to say that the contingent fees provided for in the September 25th letter are unreasonable, but we are convinced that under well established principles of law in

Oklahoma, the case should have been submitted to a jury on the question of whether the September 25th contract was fair, just and equitable and free from fraud.[6] If the jury finds that the contract was entered into fairly, with no overreaching on the part of Conner, then it may be enforced. On the other hand, if the jury finds that the September 25th part of the contract was consummated because of an unfair advantage taken by Conner, then it should determine the question of a reasonable fee, which is admittedly due.

Conner raises the question of estoppel, contending that Simler accepted the benefit of the last contract and now seeks to avoid liability thereunder. Simler admits that Conner is entitled to reasonable compensation for his services under the original employment or in quantum meruit. If the second contract is void, the provisions of the first contract would be effective and the fees should be fixed according to its terms. The doctrine of estoppel cannot be invoked to render a void contract valid. 19 Am. Jur., Estoppel § 4, 149; General Beverages, Inc. v. Rogers, 10 Cir., 216 F.2d 413, 417.

The case is reversed and remanded with instructions to grant a jury trial in conformity with the views herein expressed.

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[6] The case was originally assigned to Judge Wallace for trial and most of the preliminary matters were disposed of by him. Prior to the transfer of the case to Chief Judge Chandler, a jury trial was ordered on this issue by Judge Wallace.

APPENDIX C

Order Denying Petition for Rehearing

TENTH DAY, SEPTEMBER TERM, TUESDAY, SEPTEMBER 27th, 1960

Before Honorable Sam G. Bratton, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.